

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

GERARD SZUBIELSKI, )  
)  
Plaintiff, )  
) C.A. No. 15-984-RGA  
v. )  
)  
WARDEN DAVID PIERCE, et al., )  
)  
Defendants. )

J. Caleb Boggs Courthouse  
844 North King Street  
Wilmington, Delaware

Wednesday, June 23, 2021  
11:32 a.m.  
Pretrial Conference

BEFORE: THE HONORABLE RICHARD G. ANDREWS, U.S.D.C.J.

APPEARANCES:

TROUTMAN PEPPER HAMILTON SANDERS LLP  
BY: JOANNA J. CLINE, ESQUIRE  
BY: KARLI E. COZEN, ESQUIRE  
BY: COURTNEY A. MUNNINGS, ESQUIRE  
BY: LAURENCE Z. SHIEKMAN, ESQUIRE

For the Plaintiff

STATE OF DELAWARE  
DEPARTMENT OF JUSTICE  
BY: KENNETH L. WAN, ESQUIRE  
BY: ALLISON J. McCOWAN, ESQUIRE

For the Defendant Pierce

1 \*\*\* PROCEEDINGS \*\*\*

2  
3 DEPUTY CLERK: All rise.

4 THE COURT: All right. Good morning, everyone.

5 Please be seated. And this is *Szubielski vs.*

6 *Pierce*, Civil Action Number 15-984.

7 So why don't we just first off have who's here.

8 Ms. Cline, for your side?

9 MS. CLINE: Good morning, Your Honor. This is

10 Joanna Cline of Troutman Pepper for the plaintiff, Gerry

11 Szubielski. With me are my colleagues Mr. Larry Shiekman,

12 Courtney Munnings and Karli Cozen. And if it pleases the

13 Court, Ms. Cozen and Ms. Munnings will be handling the

14 conference.

15 THE COURT: That would be fine. All right.

16 Mr. Wan and Ms. McCowan.

17 MR. WAN: Good morning, Your Honor. Ken Wan and

18 Allison McCowan for Defendant, David Pierce.

19 THE COURT: All right. Well, good morning to

20 you all.

21 So first thing, before we get to the Pretrial

22 Order, I wanted to address the schedule and the presiding

23 judge. So right now we're scheduled to start on July 6th

24 which is Tuesday. I'd like to change the date to July 7th,

25 the Wednesday.

1 Is that a problem for either side?

2 MS. McCOWAN: No problem for us.

3 THE COURT: All right. And I'm sorry,  
4 Ms. Munnings I've seen before. Maybe I've seen you before.

5 What is your name again?

6 MS. COZEN: Karli Cozen, Your Honor.

7 THE COURT: Cozen?

8 MS. COZEN: Yes.

9 THE COURT: Okay. Hold on a second.

10 And I'm right, your name is Ms. Munnings?

11 MR. MUNNINGS: Yes.

12 THE COURT: And when you're speaking, you can  
13 take off your mask because you guys have industrial grade,  
14 and I can't hear you through the mask. Okay? If you have  
15 trouble hearing me, I'll take mine off, too, but just -- so  
16 in any event, Ms. Munnings, Ms. Cozen, Mr. Wan.

17 All right. And so are you good with the date?

18 MR. WAN: Yes, Your Honor.

19 THE COURT: Okay. So the presiding judge, it  
20 seems like it's not going to be me. What I'd like to  
21 propose to you is that you consent to have one of our  
22 magistrate judges preside over the trial.

23 Do you have any -- so what I'd actually like to  
24 do is can the two sides just confer with each other for a  
25 minute and see whether you both agree to that or consent, as

1 the word is? If you don't, we'll move on. But talk to  
2 yourselves and talk to each other.

3 All right. What's the decision?

4 MR. WAN: Go ahead. Your Honor, I'll let  
5 Ms. Cozen talk.

6 MS. COZEN: Your Honor, we'd like to talk to our  
7 client to make sure he is okay with the magistrate judge --

8 THE COURT: How long does that take?

9 MS. COZEN: -- to preside over the trial. We're  
10 planning to talk to him later today.

11 THE COURT: Okay. That would be fine.

12 Okay. So let's do this then, I'll hear back  
13 from you later today on that. And meanwhile, I have gone  
14 over the proposed Pretrial Order, and I've tabbed a few  
15 things. So really what I was going to do was address the  
16 disputes that are in the Pretrial Order, the motions in  
17 limine, maybe ask you a question or two about the  
18 evidentiary objections. I'll tell you my reaction to the  
19 voir dire, but I think that's something that is probably  
20 something more better or more addressed by the person who's  
21 actually going to do the voir dire, not me.

22 So the proposed Pretrial Order, let me see my  
23 notes here. So one of the things was on Page 13, there was  
24 a disagreement about the testimony of Mr. Troxler and  
25 Dr. Maduka-Exeh. And I take it that we're agreed these

1 witnesses are available, so far as we know; right?

2 MS. MUNNINGS: Yes, Your Honor.

3 THE COURT: All right. And so what is it that  
4 causes the plaintiff to think that Rule 32(a)(3) applies  
5 here?

6 MS. MUNNINGS: The fact that the witnesses,  
7 Scarborough and the 30(b)(6) witnesses were speaking on  
8 behalf of the Department of Correction, and therefore, their  
9 interests were aligned with Pierce.

10 THE COURT: Well, they may be Rule 30(b)(6)  
11 witnesses, but that's a slightly different thing than what's  
12 said in the Pretrial Order which cites Rule 32(a)(3). So  
13 Rule 32 -- Rule 32(a)(3) says, An adverse party may use for  
14 any purpose a deposition of a party. Right? So Mr. Troxler  
15 and the doctor are not parties. Or anyone who when deposed  
16 was the party's officer, director or managing agent or  
17 designee.

18 And the two may be Delaware's or the Department  
19 of Correction's people, but they're not Mr. Pierce who's  
20 sued in his individual capacity. Their officer, director or  
21 his officer, director, managing agent, or designee.

22 So Rule 32(a)(3), that doesn't apply; right?

23 MS. MUNNINGS: Yes, Your Honor.

24 THE COURT: Okay. But so don't sit down.

25 Was Mr. Troxler, and I imagine he was, and

1 Dr. Maduka-Exeh, were they offering Rule 30(b)(6) testimony?

2 MR. WAN: Your Honor, my understanding is that  
3 Mr. Scarborough wasn't and the remaining three were.

4 THE COURT: I don't think we're talking about  
5 Scarborough.

6 MR. WAN: Yes, Troxler and Dr. Maduka-Exeh as  
7 30(b)(6) deponents for the Department of Correction.

8 THE COURT: All right. And so the Rule 30(b)(6)  
9 testimony, why can't they offer that, because after all the  
10 Department of Correction is an entity. They can't actually  
11 call it as a witness.

12 Isn't that what Rule 30(b)(6) testimony is for  
13 is to get the position, among other things, of a  
14 corporation?

15 MR. WAN: Well, Your Honor, but my understanding  
16 is that if these witnesses are available, and that Federal  
17 Rule of Evidence 804(b) applies. So to get former testimony  
18 in, they still have to show the unavailability.

19 THE COURT: All right. I'll take that under  
20 advisement, but I think it's the case, but I'm not a hundred  
21 percent sure, that because it was corporate testimony, just  
22 because Mr. Troxler and the doctors are both actually  
23 available individually, that I don't think trumps the  
24 representative nature of the testimony. But I'll check that  
25 out because I don't think I actually had to decide that the

1 last time we had a trial.

2 And so we'll get back to you. But in any event,  
3 Rule 30(b)(6) is what you're relying on, and I'll figure  
4 that one out.

5 So then there was, also, on Page 16, there was  
6 this about the parties stipulate to the following and then  
7 there's a sentence saying, Evidence relating to the 2020  
8 State indictment against plaintiff is excluded, but you  
9 can't reach the precise contours of the evidence to be  
10 excluded.

11 Is there something here that I can resolve?

12 MS. COZEN: Your Honor, I think the precise  
13 disagreement here is what the motion in limine covers. It's  
14 our position that the motion in limine covers any  
15 investigation related to this indictment that postdates the  
16 veto. The defendants want to limit that to specific dates  
17 listed in the indictment, and we don't feel that that is a  
18 fair thing. We think anything that postdates the veto, any  
19 investigation into these allegations related to our client  
20 are no longer relevant for the claim in this trial.

21 THE COURT: Well, so let's assume,  
22 hypothetically, that the veto occurred on -- and I forget  
23 the exact date, but October 1st of whatever year it is we're  
24 talking about. And on October 2nd, Mr. Szubielski was  
25 arrested in the prison with a pound of cocaine and the

1       Warden now said, See, would that be irrelevant?

2               MS. COZEN: No, Your Honor. So the indictment  
3 is specifically about allegations that range between  
4 May 13th, 2019 to September 20th, 2019.

5               THE COURT: Okay. So that's a helpful thing to  
6 say, but -- and I think that's a different issue because  
7 you're saying anything that postdates the veto, which I  
8 think was in 2016 or 2017 and, you know, talking about 2019  
9 to 2020, you're in a much better position. And that's the  
10 reason why I was asking the question because you have then  
11 or seemingly to me made it a much broader thing you were  
12 trying to accomplish.

13               But are we really just talking about 2019 to  
14 2020 now?

15               MS. COZEN: So we're talking about those  
16 allegations in 2019 and 2020. It's our position that, let's  
17 say, the allegations were investigated in December of 2019,  
18 which would be outside the time frame that defendants have  
19 articulated. Those would also be --

20               THE COURT: I'm sorry to interrupt, Ms. Cozen,  
21 but of course the indictments have dates in them. The  
22 activity that is charged in these indictments, what's the  
23 earliest date where the indictment says something happened?

24               MS. COZEN: May 13th, 2019.

25               THE COURT: Okay. And the date that Warden

1 Pierce vetoed the security or classification, that was in  
2 2017 or 2016?

3 MS. COZEN: 2015, Your Honor.

4 THE COURT: 2015? Okay.

5 MS. COZEN: It was October 2015.

6 THE COURT: Even better for you. All right.  
7 I've got your position.

8 How is that relevant?

9 MS. McCOWAN: Your Honor, we agree with that.  
10 So if you look at our position, we agree that we would  
11 introduce the indictment. We wouldn't cross the plaintiff  
12 on the indictment. But what we weren't able to reach  
13 agreement on, and if you look at plaintiff's position as  
14 written in the pretrial conference, they would like to  
15 exclude Mr. Szubielski's involvement in any contraband which  
16 would be pre-veto and post-veto and any investigation --

17 THE COURT: Well -- yeah, keep going. Sorry.

18 MS. McCOWAN: Any investigation that may have  
19 led to the charges that were indicted. What we will show at  
20 trial is that Mr. Szubielski was under constant  
21 investigation, at least from as early as 2014. So during  
22 our discussions, it appeared that plaintiff was trying to  
23 keep those investigations out for this motion in limine.

24 THE COURT: Okay. And let's assume, just as a  
25 round number, that the veto was October 1st of 2015. So I

1 don't know, I was going to say don't sit down, but in your  
2 case, if you want to sit, please sit.

3 MS. McCOWAN: It's fine.

4 THE COURT: Ms. Munnings, do you agree that your  
5 motion in limine doesn't include anything that occurred  
6 before the veto? Oh, I'm sorry, Ms. Cozen or sorry --

7 MS. COZEN: Yes, Your Honor. We agree that  
8 anything before the veto is not included.

9 THE COURT: All right. Do you have stuff after  
10 the veto that you want to get in?

11 MS. McCOWAN: Well, as Your Honor had mentioned  
12 in the hypothetical, there are continuing contraband  
13 allegations that we interviewed or we are preparing to  
14 introduce as evidence after the veto that continue to prove  
15 that Mr. Szubielski was -- may be smuggling contraband in  
16 while he was in the SHU. We think that is important to  
17 negate the retaliation claim.

18 THE COURT: So can you be a little more specific  
19 because to the extent --

20 MS. McCOWAN: Your Honor, I believe the last  
21 piece of evidence was the 2018 incident report.

22 THE COURT: And the 2018 incident report related  
23 to something that, according to the report, occurred in  
24 2018?

25 MS. McCOWAN: Yes, Your Honor.

1 THE COURT: And when you say "the last," you  
2 mean the one closest in time to 2015?

3 MS. McCOWAN: Yes, Your Honor.

4 THE COURT: Okay.

5 MS. McCOWAN: So Your Honor, our evidence list,  
6 we have incident reports stemming from 2009 to 2019 that we  
7 would argue show a pattern of conduct, among other things,  
8 to negate the allegation that Mr. Pierce retaliated.

9 THE COURT: Wait. I lost you there for a  
10 second. Let me just go to -- so on your list of exhibits,  
11 and you helpfully have included a date of pretty much  
12 everything, there's four things in 2017 and 2018. And the  
13 first three, and these are Exhibits 9 through 12, the first  
14 three are called Incident Reports and so there's Incident  
15 Reports on May 19th and October 27th of 2017.

16 Do these have to do with contraband?

17 MS. McCOWAN: I believe -- I believe so, Your  
18 Honor. I can confirm.

19 THE COURT: Well, I guess what I'm wondering is,  
20 even if they do, it's two years or not quite two years, a  
21 year and eight months or so after the Warden's veto. How  
22 does that help prove a relevant fact for you?

23 MS. McCOWAN: Well, I would -- I believe at that  
24 point he had been, Mr. Szubielski had been moved out of the  
25 classification that he was in. So we would propose that

1       that confirms Mr. Pierce's belief that should he be moved  
2       down to a lower security than maximum, he would engage in  
3       this contraband conduct in further detail than he was in  
4       maximum.

5                   THE COURT:   But --

6                   MS. McCOWAN:   And Your Honor, I understand that  
7       there may be a relevancy objection here, but I don't think  
8       that these have anything to do with the indictment. And we  
9       agree that we're not going to talk about the indictment or  
10      cross their plaintiff about the indictment.

11                  THE COURT:   And you also have listed incident  
12      reports in 2013, 2014, 2012, 2009. To the extent you're  
13      trying to disprove retaliation, aren't those a whole lot  
14      more relevant because Mr. Pierce, whatever his qualities may  
15      be, he wasn't actually writing down or thinking, yeah, two  
16      years from now, this is going to occur. And you know, it's  
17      a forward-looking decision that he made.

18                  So what's relevant to -- because after all, what  
19      I think the issue here boils down to is do you believe  
20      Warden Pierce when he said this was his concern? And you  
21      know, it seems to me you have enough, without knowing what  
22      all these incident reports are in particular, that you have  
23      enough incident reports predating the 2015 so that they're  
24      probative and relevant. And so, yes, the indictment, as far  
25      as I'm concerned, that's out.

1           But it strikes me that the incident reports from  
2   2017 and 2018 are incredibly prejudicial. They have nothing  
3   to do with Warden Pierce's state of mind in October of 2015.  
4   And you know, I think as a proposition, they're essentially  
5   irrelevant.

6           Now, they might be relevant if Mr. Szubielski  
7   takes the stand, depending on what he says. That's a  
8   different issue. But just in terms of tending to prove or  
9   disprove the underlying facts that are at issue here, I  
10   think they're pretty much irrelevant. And to the extent  
11   they are relevant, I think they're incredibly prejudicial,  
12   and that whatever probative value they might have would be  
13   substantially outweighed by the unfair prejudice to the  
14   plaintiff. And of course, these things all occurred after  
15   other people, I forget who, eventually maybe -- Warden  
16   Pierce was the one who eventually approved his  
17   declassification.

18           But in any event, by the time this occurred, you  
19   know, he had been lowered down presumably because people  
20   thought he could be lowered down. So I don't see it as  
21   being something that, absent something that Mr. Szubielski  
22   or his counsel say, opens the door. I don't think these  
23   should be things that you're planning on getting in and  
24   certainly not things that the jury should be hearing about  
25   in any opening statement.

1 All right?

2 MS. McCOWAN: We understand, Your Honor, but the  
3 reason that we couldn't come to agreement on the motion in  
4 limine was that their position was that you couldn't  
5 introduce anything about contraband or any investigation,  
6 even around the veto.

7 THE COURT: All right. Well, apparently they  
8 backed off from that position.

9 MS. McCOWAN: Okay.

10 THE COURT: So, and as far as I'm concerned,  
11 anything that happened before, let's say, October 1st, 2015  
12 or whatever the relevant date is, I'm not excluding anything  
13 that happened before. And I don't think I've been asked to  
14 exclude anything that happened before, so to me, that's a  
15 pretty bright-line dividing point.

16 You know, if you have something that was  
17 immediately afterwards, you know, if it turned out that  
18 Investigator Roberts testified or maybe even Warden Pierce  
19 said, Yeah, I was told, and then a few days later the  
20 investigation came to fruition, that would be one thing.  
21 But that's not what we're talking about.

22 MS. McCOWAN: We understand, Your Honor.

23 THE COURT: Okay. All right. I think those  
24 were the only two things in the body of the Pretrial Order  
25 that were in dispute. There is a statement which is true

1       that it's scheduled for a three-day jury trial.

2                   How many hours per side should I allot for this?

3       And so to make sure everybody is on the same page, when I  
4       ask that question, you know, I'm going to give you a certain  
5       amount of time in hours to do your opening statement, your  
6       direct examination of witnesses, and your cross-examination  
7       of witnesses. Closing argument is separate. We'll  
8       determine that somewhere down the road during the trial.

9                   And from looking at the witness list, which I  
10       did, it looked to me like these are all fact witnesses.  
11       There's no expert witnesses.

12                   Is that right?

13                   MS. MUNNINGS: Yes, Your Honor.

14                   THE COURT: Okay. So how many hours do you  
15       think you need under that formula?

16                   MS. MUNNINGS: Your Honor, how many hours are in  
17       a trial day?

18                   THE COURT: That's a reasonable question. Six.  
19       But on the first day, the jury selection, which doesn't  
20       count against this time, that will take probably in the  
21       vicinity of two hours. So there will be, you know,  
22       somewhere in the neighborhood of three and a half to four  
23       hours on the first day, and then six hours on the second  
24       day, and six hours on the third day.

25                   MS. MUNNINGS: Your Honor, six to eight hours.

1 Eight hours.

2 THE COURT: All right. Mr. Wan, what do you  
3 say?

4 MR. WAN: Eight hours sounds fine, Your Honor.

5 THE COURT: Well, yeah, yeah. So I'd prefer you  
6 took a different attitude which would be how much do you  
7 need?

8 MR. WAN: Well, Your Honor, based on, I guess,  
9 my experience two weeks ago, I forget the time. I think it  
10 was between six or seven. So maybe it was like maybe a hair  
11 less, but that's my recollection from my paralegal,  
12 Mr. Buton (phonetic).

13 THE COURT: All right. So, Ms. Munnings, how  
14 long do you imagine your client testifying on direct  
15 examination?

16 MS. MUNNINGS: An hour and a half.

17 THE COURT: All right. And I realize these may  
18 be somewhat hypothetical answers at this point, but how long  
19 do you imagine an opening statement for your side being?

20 MS. MUNNINGS: Thirty minutes.

21 THE COURT: Okay. I forget, Mr. Wan, in the  
22 trial we just had, did we do the closing arguments on day  
23 three or day four?

24 MR. WAN: Day four, Your Honor. I think we let  
25 the jury out early on day three, and then we, on the second

1 half of day three, I think we finalized the jury  
2 instructions and the verdict sheet, and then you kind of let  
3 us go to prepare closings.

4 THE COURT: Okay. So eight honestly seems more  
5 than is necessary to me. You know, I say that. I give  
6 patent cases 12 hours, and the complexity of those is  
7 ridiculous. So I'm going to say six-and-a-half hours a side  
8 is what -- and so I'm making these rulings on the assumption  
9 that actually some other judge is going to have this. I'm  
10 certainly not binding them to these rulings, but I would  
11 expect probably that they will go with whatever I say. But  
12 they may not.

13 But it seems to me like six-and-a-half hours a  
14 side is enough and that will also give the reasonable  
15 opportunity to possibly do closing arguments on the Friday  
16 because it is a short week. So that's what I'm going to put  
17 down for that.

18 All right. So the motions in limine. And I  
19 believe the first one is the motion in limine that we kind  
20 of addressed. That's the relating to the Plaintiff's State  
21 indictment. So I think that one is resolved, as I've  
22 already said.

23 Thereafter, there is defendants -- these are all  
24 then after that Defendant's motions, I guess. So Mr. Wan,  
25 Defendant's -- well, actually the way this is is a motion in

1       limine regarding damages. And so I understand the  
2       Defendant's position, and I don't know whether the Defendant  
3       has shared with you, as I imagine they might have, that  
4       basically this motion came up in a trial that I had with  
5       Mr. Wan, and Mr. Pierce, and some other people a few weeks  
6       ago.

7                     Have you heard about that?

8                     MS. COZEN: No, Your Honor.

9                     THE COURT: Okay. All right. Well, so what is  
10       your theory as to why you can ask for a specific dollar  
11       amount, because I believe in your response you cite a case  
12       in which there was testimony about what the damages should  
13       be which is not something that's going to be happening in  
14       this case. So I thought the case you cited wasn't really on  
15       point.

16                    What's your theory as to what it is you want to  
17       do or why you can do it?

18                    MS. COZEN: Yes, Your Honor. I've had a chance  
19       to relook at the cases, and we do agree that in closing we  
20       cannot suggest a specific dollar amount for pain and  
21       suffering damages based on the current case law. We don't  
22       agree that we can't suggest a methodology as long as that  
23       doesn't include a specific dollar amount, but I do  
24       understand Defendant's position and have relooked at the  
25       case law and agree a specific dollar amount will not be

1 suggested.

2 THE COURT: So do you have an idea, because I  
3 think you're right, everything you said, and do you have an  
4 idea of what sort of methodology suggestion you have in mind  
5 or is that still to be determined?

6 MS. COZEN: Your Honor, that's still to be  
7 determined based on our trial strategy.

8 THE COURT: Okay. All right. So I did have to  
9 look at this in this last trial with the State, and as I  
10 said, I think Ms. Cozen has correctly stated what the law  
11 is.

12 I'm sorry, Mr. Wan. Do you have something you  
13 want to say?

14 MR. WAN: No, I just want to say that's correct.  
15 While she can't suggest a specific amount, nor can she have  
16 a specific dollar amount in her methodology, she can suggest  
17 some kind of methodology like in the other case.

18 THE COURT: Right. So for example, in the last  
19 case, the Plaintiff's attorney took the number of hours and  
20 tried to give the jury some argument as to, you know, the  
21 impact that would have on a person, and then suggested they  
22 figure out what that impact is and multiply it by the number  
23 of hours the person was arguably wrongfully in solitary  
24 confinement. You know, the trick is to make sure that you  
25 don't get to some place where all they have to do is math,

1 and they get the answer.

2 You understand? But in any event, you can think  
3 about that, and if you have any concern that you might be  
4 passing some line, you can certainly bring it up later. But  
5 I'm sure, in the first instance, you can probably figure  
6 this out, as you already have.

7 So that resolves Defendant's motion in limine  
8 regarding damages. Essentially, the motion is granted in  
9 light of the Plaintiff's concession.

10 And then the second motion in limine of the  
11 Defendant, oh, yeah, was about the time in solitary. And  
12 maybe I would ask the State here, because this was not an  
13 issue in my last trial, what is -- you know, there's points  
14 in your brief or your motion where you're talking about  
15 confusion of the issues, and this, and that.

16 I wasn't entirely convinced that any of this was  
17 likely to confuse a jury, but why don't you tell me what  
18 your best argument is before I get a response.

19 MR. WAN: Yes, Your Honor. I think that there  
20 is a danger here because if you look at -- this whole case  
21 is basically whatever damages Mr. Szubielski sustained, you  
22 know, if there is liability over that one-year period, so  
23 we're talking about all these other periods. And I think  
24 there is an issue where they're not looking at just the one  
25 year, they're looking at all the other years beforehand and

1       may inappropriately apply that to this case.

2               THE COURT: But if that were the case, couldn't  
3 I just take care of that by saying, you know, Jury, there is  
4 no issue about the solitary confinement before the Warden's  
5 veto?

6               MR. WAN: Well, I'm a little nervous, Your  
7 Honor, because I think in their response, they mentioned the  
8 whole eight or nine years was relevant for damages, and I  
9 don't think it is.

10              THE COURT: Well, so imagine this, you're on  
11 Captain Bligh's ship 200 years ago, and you do some offense  
12 for which you get 20 lashes. And then after he's given you  
13 the 20 lashes, he puts on ten more that's against the rules.

14              Do you think the fact that you got 20 lashes  
15 beforehand impacts how much the last ten lashes hurt?

16              MR. WAN: No, Your Honor, I think -- I, too,  
17 agree, it doesn't.

18              THE COURT: Actually, I think it does.

19              MR. WAN: But I guess your analogy, but I think  
20 in front of a jury, though, that's what I'm worried about.  
21 Correct. We are only focused on, in your instance, the last  
22 ten lashes. But in front of a jury when they hear that, the  
23 State's concern is that now they're going to say, yeah,  
24 there's one year, but there's all these other years he was  
25 held in there.

1                   THE COURT: And isn't the jury also going to  
2 hear -- I mean, they're going to -- isn't Warden Pierce -- I  
3 can't remember. I may have confused this with something  
4 else. Aren't some of the -- I forget.

5                   Do some of the documents that the people want to  
6 introduce, I mean classification decisions and things, don't  
7 they have sort of this history? I mean, are you suggesting  
8 that the jury should essentially not know what he was up to  
9 before the Warden denied the reclassification?

10                  MR. WAN: I think it's suffice to say, yeah, he  
11 was in maximum security. The length, I think, is kind of  
12 the issue, especially when my worries about the damages  
13 part, Your Honor, is really the main concern over this. I  
14 think there could be some confusion as well, but I think  
15 Your Honor thinks that that may not be the case.

16                  THE COURT: All right. Thank you, Mr. Wan.  
17                  Your side, Ms. Munnings?

18                  MS. MUNNINGS: Yes, Your Honor. We believe that  
19 the issue of confusion can be cured with a jury instruction  
20 describing what the damages would be for.

21                  THE COURT: And so I am correct that in terms of  
22 mental anguish, and hardship, and the sort of, you know,  
23 going crazy perhaps, whatever it is that Mr. Szubielski  
24 might say about this last year, is there going to be any  
25 other evidence, maybe medical records or, I don't know,

1 something else that's going to, I don't want to say support,  
2 but sort of add to the Plaintiff's own testimony about how  
3 terrible it is?

4 MS. MUNNINGS: Yes.

5 THE COURT: And that would be?

6 MS. MUNNINGS: There are the -- well, part of  
7 the disputed evidence is or exhibits is photographs of the  
8 prison cell, and we'd like to, if we can't use those, we'd  
9 like to be able to get pictures of the cells.

10 THE COURT: Okay. So actually I did see that.  
11 The objection to that is that they were produced in the  
12 CLASI litigation pursuant to a Protective Order issued by  
13 now retired Judge Sleet.

14 MS. MUNNINGS: Yes, Your Honor.

15 THE COURT: Okay. So since he's not around to  
16 allow the release of the pictures, I think I can do that in  
17 his place. I feel pretty confident that, in fact, if he  
18 were still on the bench, he would do that. So you're going  
19 to be able to use the pictures. And perhaps -- I would  
20 appreciate it if you prepared the shortest possible order  
21 that I would sign authorizing you to use these pictures so  
22 nobody's, you know, subject to contempt of court orders down  
23 the road.

24 Okay?

25 MS. MUNNINGS: Yes, Your Honor.

1 THE COURT: So if you could do that and submit  
2 it.

3 And I'm sorry, I lost my thread here. So we  
4 were talking about corroboration, so yes, you were talking  
5 about the pictures. True.

6 Anything else that you have in mind right now?

7 MS. MUNNINGS: There are also medical records  
8 from 2015.

9 THE COURT: Do the medical records give a flavor  
10 of, for lack of a better word, a man going crazy?

11 MS. MUNNINGS: Yes, Your Honor.

12 THE COURT: I mean, just because I ask a leading  
13 question, you don't have to answer it yes. I mean, is  
14 that --

15 MS. MUNNINGS: Yes.

16 THE COURT: That is your view?

17 MS. MUNNINGS: Yes.

18 THE COURT: Okay. All right.

19 Well, so I'm going to -- oh, yeah. Okay. So  
20 the description in the complaint that is a key piece of  
21 evidence in your case, isn't Mr. Szubieliski going to say  
22 that person who's person number 1, 2, 3, 4, 5 or 6,  
23 whichever one he was, doesn't that tell you how long he was  
24 in solitary confinement?

25 MS. MUNNINGS: Yes, Your Honor.

1 THE COURT: What about that?

2 MR. WAN: Your Honor, Mr. Pierce's testimony is  
3 that he never ever saw the complaint, so he wouldn't have  
4 identified it any way.

5 THE COURT: Well, so right, but presumably the  
6 complaint is going to come into evidence; right?

7 MR. WAN: I think from your ruling from the last  
8 trial, I think only for state of mind, but -- well,  
9 actually, I don't know, Your Honor. I think he --

10 THE COURT: So the difference here is the  
11 complaint is the main, is one of the Plaintiff's main pieces  
12 of evidence of saying that Warden Pierce, you know, could  
13 identify Mr. Szubielski as a complainant; right?

14 MR. WAN: That's -- yeah, that's their theory of  
15 the case is my understanding.

16 THE COURT: And I could tell them, you know, me  
17 telling the jury, it only comes in for -- it doesn't come in  
18 for the truth of the matter asserted. I mean, it's going to  
19 be pretty hard for the jury to ignore that Mr. Szubielski is  
20 going to say, Yeah, the guy that was in solitary for seven  
21 years is me and who has whatever psychiatric diagnoses he  
22 has. So I think you're fighting a battle that you kind  
23 of -- it seems to me it's pretty close to impossible to  
24 actually do. And what's more is I think it is relevant to  
25 damages.

1           You know, one of the things, you may recall  
2           this, Mr. Wan, the expert was saying in the last case was or  
3           even quoting the U.S. Supreme Court was, you know, sort of  
4           like, you know, the cumulative effect of going crazy.

5           MR. WAN: Your Honor, I'm sorry to interrupt.  
6           I'm looking over Plaintiff's exhibit list. I don't actually  
7           see any medical records postdating the veto. Maybe I'm  
8           wrong. I was just looking quickly because I didn't really  
9           recognize which exhibit that was.

10          THE COURT: Well, I can't -- I see something  
11          called Contact Notes for 10/14/15.

12          MR. WAN: Right, which I think predates the  
13          veto.

14          THE COURT: I forget. I think that might have  
15          been Ms. Munnings. Maybe it was you, Ms. Cozen, I don't  
16          remember.

17          Somebody, do you actually plan to introduce  
18          medical records?

19          MS. COZEN: Your Honor, we do have some medical  
20          records that reference Mr. Szubielski's mental health  
21          condition, and we think those are relevant sort of to show  
22          the negative impact that an extra year in solitary  
23          confinement could have on someone with his mental health  
24          conditions.

25          THE COURT: Do you know offhand, looking at the

1 24 exhibits that are listed for your side, which medical  
2 record you're talking about?

3 MS. COZEN: For instance, there is a letter  
4 which would be Exhibit 6 that discusses the need for our  
5 client to be in --

6 THE COURT: Right, but that's from 2008.

7 MS. COZEN: Correct, Your Honor. I don't think  
8 we plan to introduce medical records that postdate the veto  
9 regarding Mr. Szubielski's mental health condition; however,  
10 he may testify about that on direct.

11 THE COURT: Sure. No doubt.

12 MS. COZEN: And additionally, the doctors who  
13 are fact witnesses may testify about his.

14 THE COURT: Wait. I'm sorry, which doctors?

15 MS. COZEN: There are a few doctors that were  
16 30(b)(6) witnesses and --

17 MS. MUNNINGS: Drs. Fink and Maduka-Exeh.

18 THE COURT: And did they actually testify about  
19 Mr. Szubielski specifically as opposed to general policy?

20 MS. MUNNINGS: Yes, Your Honor. They talked  
21 about his case, and they had reviewed his medical records  
22 and the medications that he was on.

23 THE COURT: Okay. Actually, that reminds me:  
24 In terms of the Rule 30(b)(6) question that you raised  
25 earlier and I said, I would take under advisement, it would

1 be helpful for me if you would get the transcript, which you  
2 presumably have, of Mr. Troxler and the doctor and submit  
3 them to me with a letter highlighting in yellow or some  
4 other color than red or green what portions of the  
5 testimony -- you know, this doesn't have to be your final  
6 decision, so to speak -- but which portions of the testimony  
7 you're trying to get in. That might help me think about  
8 this.

9 MS. MUNNINGS: Yes, Your Honor.

10 THE COURT: Okay. All right.

11 So basically I'm going to let in testimony about  
12 what I believe are seven years in the Secure Housing Unit,  
13 or solitary, or what have you. And I suggest the Defendant  
14 possibly propose a limiting order, a limiting instruction  
15 that I could give about the history as to what it is --  
16 well, why don't you see what it is. You know, at a minimum,  
17 it will have to say any damages are for the time period from  
18 October 24th, 2015, to, I guess, October 11th, 2016. And  
19 that's what I think it should say at a minimum, but maybe  
20 you all can think of something better.

21 All right. I think that was -- okay. So I  
22 think that takes care of the motions in limine. I did --  
23 wait. Hold on a second. I did look at the exhibit list  
24 which -- yeah. Well, I see actually, of course, the  
25 Pretrial Order for the doctor and Mr. Troxler has the

1 proposed designations. They seem pretty modest. That  
2 doesn't mean they're admissible, but they do seem like  
3 they're maybe 12 pages total between the two of them.

4 So in any event, if you would submit that. And  
5 to the extent that, you know, I need -- it would probably be  
6 better to just submit the whole thing so I have any context  
7 if I have a question about something.

8 I did wonder on the Plaintiff's -- so I noted, I  
9 went through and I noted that you had your Plaintiff's  
10 exhibit list, and there were some objections from the  
11 Defendant. And some of them did not seem like the sort of  
12 objections I could form any reasonable view of in the  
13 abstract.

14 But on the other hand, the objections to  
15 Exhibit 16, 17, 18 and 24, they seemed like things that I  
16 couldn't come up with a theory as to why those were actually  
17 admissible for the Plaintiff. You know, the Settlement  
18 Agreement and exhibits for the lawsuit, the signed  
19 Settlement Agreement, the complaint in some case in 2019,  
20 and a Delaware online article in 2019. You know, there seem  
21 to be a lot of problems. You know, relevance and hearsay  
22 spring to mind.

23 Do you have a theory that you want to explain to  
24 me as to why those things should be admissible?

25 MS. COZEN: Yes, Your Honor. I'll start by

1 saying we withdraw Exhibit 24. We've reconsidered in light  
2 of Defendant's objections and agree that we will not  
3 introduce that as evidence --

4 THE COURT: Okay.

5 MS. COZEN: -- in this case. Regarding  
6 Exhibit 17 and 16, I can discuss those together because  
7 they're both --

8 THE COURT: They're the same thing?

9 MS. COZEN: Yes, they're both versions of the  
10 same thing. Defendants object to those on relevance  
11 grounds. Now, we feel they're relevant and they show  
12 conditions of confinement for prisoners like our client,  
13 Mr. Szubielski, who was housed in solitary and the poor  
14 mental health treatment he was getting during that year.  
15 The Settlement Agreement was signed in 2016, I believe.

16 THE COURT: August of 2016.

17 MS. COZEN: August of 2016. So all of those  
18 changes were not yet implemented, and it shows that they  
19 could have been. It shows that there is a feasibility of  
20 these different improvements that our client did not benefit  
21 from in that one year, and we think that is directly  
22 relevant for showing damages and the poor conditions our  
23 client was facing from 2015 to 2016.

24 THE COURT: But your complaint is not that he  
25 didn't get good treatment in solitary confinement, it was he

1 was in solitary confinement at all; right?

2 MS. COZEN: Yes, Your Honor, but I think that  
3 goes to damages to show his conditions in solitary will  
4 allow the jury to adequately evaluate compensatory damages.

5 THE COURT: Does the Settlement Agreement say  
6 these are the conditions in solitary, or do they say these  
7 are the things Defendant agrees to do in the future?

8 MS. COZEN: Your Honor, it says these are the  
9 things Defendant agrees to do in the future which shows the  
10 feasibility of being able to do them.

11 THE COURT: But it doesn't actually show whether  
12 or not or to what extent they were being done in the past;  
13 right?

14 MS. COZEN: That is correct, Your Honor.

15 THE COURT: How would you tie whatever these  
16 things are to what Mr. Szubielski actually experienced?

17 MS. COZEN: Sure, Your Honor. I think we could  
18 look at the Settlement Agreements, and let's say,  
19 hypothetically, they now require inmates in the SHU to have  
20 two hours of recreation a day, when before it might have  
21 been two hours a week. We could show that and show the  
22 contrast that this was the conditions before, this is what  
23 they are required to do now. So clearly, it wasn't good  
24 before.

25 THE COURT: You know, the "clearly it wasn't

1 good before," that sounds like a purpose that's prohibited  
2 by Rule 407.

3 MS. COZEN: I think Your Honor's correct, Your  
4 Honor, however, feasibility of making these changes is not  
5 prohibited by Rule 407.

6 THE COURT: That's true, or I think that's true.  
7 But there seems to be a gap between -- your only evidence,  
8 I'm guessing, that these changes are something that could  
9 have happened and didn't. I mean, I guess you could ask  
10 Mr. Szubielski if it says see mental health counselor three  
11 times a week, you could ask him: How often did you see him?  
12 Once. Would you have like to have seen such a person three  
13 times a week? Yes.

14 So all right. Mr. Wan or --

15 MR. WAN: Your Honor, I don't think, at the  
16 outset, they're at all relevant. I think it's kind of  
17 one -- it's not a deliberate indifference case, it's a  
18 retaliation case. So as far as what could have been done,  
19 that's really not an issue here. You know --

20 THE COURT: Well, so the only thing that it's  
21 related to is possibly damages; right? Right?

22 MR. WAN: Sorry?

23 THE COURT: Sorry. Ms. Cozen, this is entirely  
24 related to damages or to nothing; right?

25 MS. COZEN: Correct, Your Honor. We think this

1 is a damages exhibit.

2 THE COURT: All right.

3 MR. WAN: Your Honor, this is a subsequent  
4 remedial measure that still can't come in.

5 THE COURT: Well, is that a question or an  
6 assertion?

7 MR. WAN: Well, I guess, Your Honor, I believe  
8 it's a subsequent remedial measure that does not come into  
9 play here. And I think the agreement focuses on liability,  
10 too, so --

11 THE COURT: Yeah, I have to -- there might be  
12 a -- you know, the Rule 407 ends with the Court may admit  
13 this evidence for another purpose, and then it says such as,  
14 and it has impeachment or, if disputed, proving ownership,  
15 control, or the feasibility of precautionary measures.  
16 Assuming feasibility and precautionary measures is an  
17 example and not a complete statement of what it might cover,  
18 you know, I guess the first question is: I'm having a hard  
19 time -- you know, the disputed part, and maybe, for all I  
20 know, it's already in Warden Pierce's testimony, but you  
21 know, there is a precondition to admitting it, even for  
22 feasibility, which is there has to be an argument about  
23 feasibility. And I don't know whether there will actually  
24 even be an argument about feasibility. Right?

25 MS. COZEN: Yes, Your Honor, that is the quoting

1 of the rule.

2 THE COURT: All right. Well, why don't we do  
3 this: I'm going to tentatively exclude the Settlement  
4 Agreements, but certainly if there is a dispute about  
5 feasibility that surfaces, you can bring it up again. You  
6 know, plaintiffs aren't the only ones who can open a door.

7 Okay. What about the complaint in the 2019  
8 case? Actually, hold on just a second, Ms. Cozen.

9 All right. What about the complaint in 2019?  
10 That's Exhibit 18.

11 MS. COZEN: Your Honor, I think in light of our  
12 discussions, we are going to agree not to present  
13 Exhibit 18.

14 THE COURT: Okay. All right. I think the rest  
15 of the objections to your things are probably best decided  
16 at some later point because none of them at least --  
17 actually, maybe I can actually overrule a couple of the  
18 Defendant's objections.

19 Mr. Wan, the notice of classification assignment  
20 is Plaintiff's Exhibit 7. I take it that's the decision  
21 here, that's actually the heart of the case or it's not the  
22 Warden's decision, it's the decision of, I don't know, one  
23 of the committees that preceded the Warden?

24 MR. WAN: Sorry, Your Honor. Give me one  
25 second.

1 THE COURT: Sure.

2 MS. COZEN: We have a copy of the exhibit if you  
3 want it.

4 MR. WAN: Yeah, that would be wonderful. Thank  
5 you very much. You're asking about number seven, Your  
6 Honor?

7 THE COURT: Number seven, yes, the notice of  
8 classification assignment dated September 1st, 2015.

9 MR. WAN: Your Honor, the hearsay objection,  
10 because we don't know whose writing is actually on there, I  
11 think there was a hearsay objection with who actually  
12 circled it and you know --

13 THE COURT: But this is the prison's record of a  
14 classification decision, is it not?

15 MR. WAN: It is.

16 THE COURT: Is it not a business record?

17 MR. WAN: I think the document itself would be a  
18 business record, the writing on it would still be hearsay.  
19 You can't see who --

20 THE COURT: What does the writing say on it that  
21 is --

22 MR. WAN: It says, it, looks like you've been  
23 approved arrow possibly the word don, and then don screw it  
24 up. I don't know. I don't know what --

25 THE COURT: All right. Do you know what this

1     handwriting means or have a theory that you're going to  
2     advance?

3                 MS. COZEN: Well, Your Honor, I do have extra  
4     copies if you would like one.

5                 THE COURT: All right. Well, why don't you hand  
6     one up.

7                 MS. COZEN: These are all the exhibits, both  
8     Plaintiff's and Defendants, tabbed separate by exhibit  
9     number.

10                THE COURT: So is there going to be any  
11     explanation of what the handwritten language means?

12                MS. COZEN: Your Honor, we would offer the  
13     handwritten portion just for the effect on the listener  
14     which is permissible, not necessarily --

15                THE COURT: Why do we care what the listener's  
16     effect is?

17                MS. COZEN: So our client has been housed in  
18     solitary, again, for seven, eight years and he gets this  
19     notice that he is now approved to move. He's naturally  
20     going to be excited. He's going to be looking forward to  
21     that.

22                THE COURT: Oh, it looks like, You have been  
23     approved. Your client is going to say, Yeah, this was given  
24     to me?

25                MS. COZEN: Yes. Correct, Your Honor.

1                   THE COURT: And I think it is cut off. What it  
2 actually says, it looks like, You've been approved. Do not  
3 screw it up.

4                   MS. COZEN: Correct, Your Honor.

5                   THE COURT: What do you have to say about that,  
6 Mr. Wan?

7                   MR. WAN: Well, Your Honor, we don't -- if we  
8 can't prove who says that, I don't think they come in. The  
9 handwriting is what, I think, kind of bothers me because now  
10 it's someone -- if that's what it says, it's telling  
11 Mr. Szubielski, Don't screw it up, and I don't want them to  
12 require -- you know, I don't think there's any evidence that  
13 he said that.

14                  THE COURT: So I take it this document, which  
15 has a stamp on it saying Received, actually comes from the  
16 files of the prison and not from Mr. Szubielski; right?

17                  MS. COZEN: Yes, Your Honor. It was Bates  
18 stamped from the DOC.

19                  MR. WAN: I think it's still -- I think the  
20 document itself --

21                  THE COURT: Well, so --

22                  MR. WAN: There's a summary judgment,  
23 Exhibit 20. So we're not positive if this one was produced  
24 by us, Your Honor. I think the point being whether -- if he  
25 got this, the record -- it is a business record. I think

1 the writing on this is the issue here.

2 THE COURT: Well, so it's pretty clear that the  
3 writing on it comes from somebody contemporaneously with  
4 knowledge.

5 MR. WAN: But it could be Mr. Szubielski  
6 himself, we don't know.

7 THE COURT: So I'm going to let it in because  
8 somebody, you know, I assume Mr. Szubielski will say, Not my  
9 writing, because I don't usually write notes to myself. And  
10 so I think it's a business record, and I think it's -- I  
11 don't actually think there's any prejudice to the defendant.  
12 I think it is a logical thing.

13 I think the plaintiff's argument about, you  
14 know, it's worse if you're expecting something and you don't  
15 get it than if you have no expectations. And so I think it  
16 kind of fits in with the Plaintiff's damages argument. And  
17 I don't think it really matters who in particular wrote it  
18 as long as it wasn't Mr. Szubielski.

19 So I'm going to admit that. Okay. That is  
20 Plaintiff's Exhibit 7.

21 And then the other one that I thought, the  
22 reclassification form for males, number 11, Exhibit 11,  
23 which certainly looks like more business records. What's  
24 the problem here, Mr. Wan? You know, I see it has his  
25 escape history in the middle of it. I'm not entirely sure

1       why you're trying to keep this out.

2               MR. WAN: I guess it comes in, Your Honor.

3               THE COURT: I mean, but it is some official form  
4       that's part of this process. I mean, it seems -- I mean, it  
5       seems like -- in any event, I don't see a relevance. I  
6       mean, this is like the work of some -- I mean, this is part  
7       of the process; right?

8               MR. WAN: Yes, Your Honor. This is -- this is  
9       done as part of -- it is a business record.

10              THE COURT: Well, no, but I mean, it's not only  
11       a business record, but it's a business record relating to  
12       the buildup to Warden Pierce vetoing classification.

13              MR. WAN: Yeah, because this one is dated  
14       7/29/2015, so I guess that would be four months before the  
15       veto. Yeah.

16              THE COURT: Okay. You know, you may want to do  
17       things -- you may want to not confuse the jury. You may  
18       want to redact what the run date is in the top right-hand  
19       corner of this or I guess have some explanation, even though  
20       it seems pretty clear the thing is dated August 10th, 2015  
21       at the end.

22              So in any event, I'm going to overrule that  
23       objection. I think it's quite relevant, and there's, so far  
24       as I can see, no unfair prejudice or anything else.

25              All right. Let me just see the Defendants'

1 exhibits. So I did cavalierly tell the Defendants earlier  
2 that all these earlier incident reports are coming in. But  
3 I do notice that every single defense exhibit is objected  
4 to.

5 Actually, let's skip the incident reports for a  
6 minute. Michelle Roberts, is she on the witness list,  
7 Mr. Wan or Ms. McCowan?

8 MS. McCOWAN: She is, Your Honor.

9 THE COURT: So with the affidavit dated  
10 June 31st of 2016, presumably that's not actually going to  
11 be something you're offering; right? She's going to testify  
12 firsthand?

13 MS. McCOWAN: That's correct, Your Honor, but to  
14 the extent she can't recall, we want to make sure --

15 THE COURT: Okay. Well, in any event, so  
16 subject to some proper use, it is not otherwise going to  
17 come in just because you have an affidavit. So I'm going to  
18 sustain that objection.

19 All right. What about the various  
20 classification decisions and incident reports that are  
21 Exhibits 1 through 7?

22 MS. MUNNINGS: Your Honor, each of these records  
23 have narratives from an officer that talk about what other  
24 people did, what people said, and so they're hearsay, and  
25 they're also highly prejudicial and confusing. They're not

1 going to the veto. They're he-said-she-said type of  
2 documents included in those incident reports.

3 THE COURT: But this is kind of like the backup  
4 for, for lack of a better word, Mr. Szubielski's prison rep;  
5 right?

6 MS. MUNNINGS: Yes, Your Honor.

7 THE COURT: So let me just see if I've got the  
8 history kind of straight which is for a number of years  
9 before Warden Pierce was the Warden, Mr. Szubielski was, I  
10 guess, six years to be exact or five or six kept in solitary  
11 confinement, or the Secure Housing Unit, or however you want  
12 to call it, based on decisions that are not at issue in this  
13 case.

14 But the reason that Warden Pierce gives for  
15 vetoing it is, would you say, I knew there was a current  
16 investigation going on or something like that? Okay, got  
17 that.

18 Does he have a like part B, you know, he's a  
19 really bad guy, or is it really just, no, there was an  
20 investigation going on and, you know, intelligence that he's  
21 doing smuggling or something like that?

22 MR. WAN: We have things, I believe, like this  
23 and also there are other factors, including Mr. Pierce had  
24 an escape attempt as well. So I think, you know, all of  
25 this is relevant to show that, you know, yes, there is an

1 initial classification with the NBC and IBCC. But then the  
2 Warden knows the, you know, I guess the most sensitive  
3 information, so that's why he can -- there are times where  
4 he does a veto. And for security purposes, that might not  
5 be privy to the lower people who do the initial  
6 classification. I think this kind of moves up to that.

7 THE COURT: Oh, yeah. I think I've heard that  
8 testimony recently.

9 MR. WAN: Thank you, Your Honor.

10 THE COURT: How much of the bad stuff that  
11 Mr. Szubielski's either done or been accused of doing that's  
12 covered in these seven exhibits is also essentially  
13 summarized in the reclassification form that immediately led  
14 up to the Warden's veto?

15 MR. WAN: They're not, Your Honor, I think  
16 classifications. And I don't know if you remember from the  
17 other trial, but classifications are very bare bones. They  
18 may contain a statement if --

19 THE COURT: Right. I do remember that now that  
20 you mention it.

21 MR. WAN: So I think the incident reports are  
22 important to show in greater detail exactly what was going  
23 on and not just some --

24 THE COURT: Well, so that's what I'm kind of  
25 wondering, the greater detail because we have the

1 Plaintiff's Exhibit 11 which, among other things, under  
2 Escape History says, Walk off from work release, furlough,  
3 courtrooms, police, recovery center within the past three  
4 years. Gives him two points.

5 MR. WAN: Yeah, but for example in --

6 THE COURT: Oh, wait. I'm sorry. I guess it  
7 doesn't give him points because the box none is checked. So  
8 those are -- oh, okay. I get it. If the box was checked --  
9 so escape history, according to this, is none. You've got  
10 age. There's something that says high severity, all felony  
11 escapes. None. Disciplinary.

12 So he has 15 or more years remaining to be  
13 served. Active in a worker program. Meeting. So I think  
14 you've given me a binder that has these seven documents. I  
15 think the best thing to do would be for me to have a look at  
16 them without you all staring at me and see.

17 You know, I guess part of what I'm concerned  
18 about would be trying to avoid -- trying to be fair in terms  
19 of what the jury would hear. You know, as I've said,  
20 they're going to hear that he was in solitary for six years.  
21 And as I've said, they're going to be told essentially  
22 that's not an issue in this case.

23 But in terms of the Warden's decision, you know,  
24 it's hard to completely sanitize why he was in there for six  
25 years, you know, why the Warden would even be familiar with

1 it. Because I think there was testimony or am I confusing  
2 this with the last case that the Warden -- yeah, I think  
3 part of your theory is the Warden knew who he was. Why did  
4 the Warden know who he was? Did they go to high school  
5 together or, you know, has the Warden been hanging around  
6 the Correctional Center for a long time and Mr. Szubielski's  
7 the kind of guy who stands out? I'm guessing it's more or  
8 less the latter, and this would all kind of fit in with  
9 that.

10 But it strikes me that, as you say,  
11 Ms. Munnings, a lot of the details are prejudicial with no  
12 probative value. It's a lot more, you know, that he had  
13 incidents in 2000 -- you know, 2009 is a long time ago, but  
14 2012, 2013, 2013 again, 2014.

15 Were any of these incidents involving smuggling  
16 or contraband?

17 MR. WAN: Yes, Your Honor. Sorry.

18 MS. MUNNINGS: Some are or like someone says  
19 someone else is sending something to Mr. Szubielski. Some  
20 are Mr. Szubielski has too much soap, or envelopes, or  
21 stamps, and so it's -- they're not really proving -- I  
22 guess, I don't know what their theory is, but they're not  
23 relevant. They're not probative and they're prejudicial.

24 THE COURT: All right. Well, so it seems to me  
25 that things that involve contraband or something else is a

1 lot more relevant than things that might involve, say, an  
2 assault or even an escape. But I think the best thing to do  
3 is for me to have a look at these, and I may suggest --  
4 well, I don't know what I may suggest, but I am thinking  
5 that particularly to the extent -- you know, it might be  
6 something where it's possible to stipulate to some prior  
7 events concentrating on the contraband ones. I'm not sure,  
8 but I think I need to look at it, and I also think I need to  
9 bring this to an end because I have something at  
10 one o'clock.

11 So in any event, that's as much as I plan to do  
12 with the exhibits today. And I will just tell you that if I  
13 were doing the voir dire, basically Mr. Wan or Ms. McCowan  
14 cleverly submitted basically the voir dire that I did in the  
15 last case, so I'd be starting from where they are. The one  
16 thing that I thought may be needed to be added to what they  
17 submitted was a question which you all had in your voir  
18 dire, which was essentially, you know, this isn't the way  
19 you worded, I don't think, but does the involvement of the  
20 ACLU in this cause you to jump to some conclusion or  
21 otherwise not be able to judge the case fairly? But I  
22 thought that as long as we're doing the ACLU, we might as  
23 well do the Community Legal Aid, too, even though they're  
24 probably a lot less controversial. So I was going to do  
25 some -- I had written down a question which I had imagined

1 as 16(a) in the submission from the State, something like,  
2 As I mentioned before, Mr. Szubielski claims Mr. Pierce  
3 retaliated because of Mr. Szubielski's involvement in an  
4 earlier lawsuit. That earlier lawsuit was brought by the  
5 American Civil Liberties Union or ACLU and the Community  
6 Legal Aid Society or CLASI. Do you have strong feelings,  
7 either positive or negative, about either the ACLU or CLASI?

8 You know, a lot of these questions where you  
9 have things, it's possible for people to be on either side  
10 of an issue, and I don't like to hint that they should be on  
11 one side or the other. So even though you only were  
12 interested in the negative, I think it's better to ask about  
13 both sides.

14 So in any event, I've written that down.  
15 Hopefully, I will be giving this to some other judge, and  
16 you can deal with that person.

17 In any event, so that's what I would do if I  
18 were keeping this. And I'm not going to do -- I wouldn't do  
19 a jury questionnaire. For one thing, the proposed jury  
20 questionnaire is way more intrusive than I would ever do.  
21 And you know, the other thing is I think a questionnaire  
22 that's this intrusive sort of discourages people from jury  
23 service. So I'm generally not in favor of that.

24 I'll let you work out with the judge who's  
25 handling this exactly how jury selection and things like

1       that will go. I do, because I have a criminal trial going  
2       on, I expect to be using the sixth floor. So your trial  
3       will be on either the fourth floor or the second floor, I'm  
4       not sure which.

5               So is there anything else? I really do have to  
6       go very shortly, but is there anything else that either side  
7       wants to bring up?

8               MR. WAN: Your Honor, one thing I'd bring up is  
9       regarding the designations for the 30(b)(6) testimony, I  
10      think in the other case, we also, I guess, had some counter  
11      designations if something comes in. So do you want them to  
12      submit it first and then --

13              THE COURT: If you've got counter designations,  
14      you better go counter designate them this afternoon and tell  
15      them what they are because I don't want to get piece meal;  
16      right?

17              MR. WAN: That's fair, Your Honor.

18              THE COURT: Okay. Ms. Cozen.

19              MS. COZEN: Yes, Your Honor. We have a few more  
20      small matters.

21              One is our client is currently housed in Sussex,  
22      and we would like him to be moved about a week before the  
23      trial to the Howard Young facility so we can meet with him.  
24      It's just quite far from Wilmington for us to meet with him  
25      on a regular basis to adequately prepare, and we would

1 request the Court allow that.

2 THE COURT: Well, you know, the problem is he's  
3 a State prisoner. I'm not sure that I can just direct the  
4 Department of Correction to house him, though it would make  
5 a lot of sense.

6 Mr. Wan, I imagine that the two of you are not  
7 actually the lawyers who give counsel to the Department of  
8 Correction as opposed to represent them in litigation?

9 MR. WAN: That is correct, Your Honor.

10 THE COURT: Do you think there's anything you  
11 could do in this regard?

12 MS. McCOWAN: So Your Honor, they've asked for  
13 this. We've made videoconferencing available for Plaintiff  
14 and his counsel to communicate on whatever basis they need  
15 to. Because Mr. Szubielski has had an escape attempt from  
16 Howard R. Young, and he is currently facing these new  
17 criminal charges, the DOC's position, from what I understand  
18 from their counsel, would be that they don't want to give  
19 anything certain to Mr. Szubielski or his family given the  
20 pending criminal charges and his escape attempt.

21 THE COURT: Is it the case that for the trial --

22 MS. McCOWAN: He will be housed up here for the  
23 trial and for some period before, but we wouldn't be -- the  
24 DOC wouldn't be comfortable --

25 THE COURT: All right. So I'm not comfortable.

1 I wouldn't even -- I'm not very comfortable doing this when  
2 I'm dealing with the U.S. Marshals in federal prison over  
3 which I have some authority, or I don't actually have some  
4 authority, but I do have some ability to do something. I am  
5 even more hesitant to do something, particularly since it  
6 sounds to me like videoconferencing and the fact that he  
7 will be brought up here some time before the trial and will  
8 be here at the trial or be local at the trial, I'm not going  
9 to do anything more than that. What the State's doing  
10 sounds fine to me.

11 MS. COZEN: Thank you, Your Honor.

12 THE COURT: Anything else?

13 MS. COZEN: Yes, Your Honor. We also would  
14 request that our client be allowed to wear a long-sleeved  
15 undershirt to cover any tattoos he has under --

16 THE COURT: I don't see a problem with that. I  
17 take it you don't have a problem with it. In fact, I mean,  
18 but, yeah, yeah. I mean, sure.

19 Have you asked somebody if you could do that,  
20 and they've said, No?

21 MS. COZEN: Opposing counsel wouldn't commit to  
22 allowing our client to wear street clothes, so we just want  
23 to make sure --

24 THE COURT: Well, I'm not so sure about your  
25 client wearing street clothes, but I am perfectly happy to

1 have him cover up tattoos and other things that are  
2 prejudicial for no good reason. You know, the street  
3 clothes, what is going to be obvious that he's in prison  
4 right now, you know, it's -- but in any event, that's not  
5 what we're talking about. But T-shirts, undershirts, yes,  
6 he can wear them.

7 MS. COZEN: Thank you. And the last matter to  
8 bring to your attention, we were wondering what the method  
9 for striking jurors is that this Court uses.

10 THE COURT: Well, I use something called the  
11 struck juror method. I'll tell you what, I've really got to  
12 go. I expect that the judge to whom this is assigned, which  
13 hopefully a magistrate judge will be getting in touch with  
14 you very quickly, and things like that which might be done  
15 differently by another judge anyhow is better discussed with  
16 them.

17 Okay?

18 MS. COZEN: Thank you, Your Honor.

19 THE COURT: Okay. Well, thank you all for your  
20 preparation in this. On the assumption that I won't see you  
21 again, Ms. Cline, thank you for taking the representation.  
22 And so I will issue some order at least memorializing some  
23 of the things that I've said here, and I hope to hear back  
24 on the --

25 MS. CLINE: I'm sorry, Your Honor.

1 THE COURT: That's okay. And I hope to hear  
2 back on the consent this afternoon.

3 All right. We'll be in recess. Thank you.

4 DEPUTY CLERK: All rise.

5 (Court was recessed at 12:58 p.m.)

6 I hereby certify the foregoing is a true and  
7 accurate transcript from my stenographic notes in the  
8 proceeding.

9 /s/ Heather M. Triozzi  
10 Certified Merit and Real-Time Reporter  
U.S. District Court

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